

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROLANDO ALBURQUERQUE,  
Appellant,  
vs.  
JAIME ALBURQUERQUE,  
Respondent.

No. 82598-COA

FILED

DEC 13 2021

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Rolando Alburquerque appeals from a post-decree order regarding child custody. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

In the proceedings below, the parties were divorced by way of a decree of divorce entered in 2012. Pursuant to the terms of the decree, the parties were awarded joint legal and joint physical custody of their minor child. Shortly thereafter, in October 2012, the district court modified the parties' parenting schedule due to Rolando's work schedule. In its order, the court maintained the parties' joint physical custody status, but modified the timeshare such that Rolando had the child every other Thursday at 8:00 p.m. until the following Tuesday at 8:00 p.m., and all other custodial time was exercised by respondent Jaime Alburquerque. The parties followed this schedule until Rolando moved to modify the timeshare in 2020.

In his motion, Rolando asserted that he was not seeking to change the custodial status from joint physical custody, but that he only sought to modify the schedule—seeking a week-on/week-off timeshare.

Rolando argued that the child was only three years old at the time the prior custody order was entered and now, at twelve years old, the child had different needs. Additionally, Rolando argued that he had recently retired and he was, therefore, able to spend more time with the child when the child was not in school, and that the child asked to spend more time with Rolando. Jaime opposed the motion, asserting that Rolando failed to consistently exercise his custodial time under the parties current timeshare and he, therefore, should not be awarded additional time. In his reply, Rolando asserted that he had not voluntarily declined to exercise his custodial timeshare. Rather, the child complained about being tired at school due to the long drive from Rolando's home in North Las Vegas to the child's school in Henderson. And, in an effort to ensure the child got enough rest and to co-parent, Rolando would take the child to Jaime's home on school nights so he would not have to get up as early for school the following day. But, Rolando asserted this only lasted a short time because he was losing a significant amount of time with the child and the child began online schooling due to the COVID-19 pandemic.

After a hearing, the district court denied Rolando's motion to modify custody, concluding that Rolando did not have joint physical custody as he had the child 35 percent of the time while Jaime had the child 65 percent of the time. The court went on to find that pursuant to *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007), and *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993), there was no substantial change of circumstances warranting a modification of the parties' timeshare and that the best interest standard was not met. This appeal followed.

On appeal, Rolando challenges the district court's denial of his motion to modify the parties' custodial timeshare, asserting that the district court abused its discretion in concluding that he did not have joint physical custody, contrary to the parties' custodial order, and that the district court abused its discretion in applying *Ellis* and *Rooney* to his request for modification. In her response, Jaime asserts that the district court properly denied Rolando's motion to modify as Rolando failed to demonstrate a substantial change in circumstances or that it was in the child's best interest to modify the timeshare, pursuant to *Ellis*.

This court reviews a child custody decision for an abuse of discretion, but "the district court must have reached its conclusions for the appropriate reasons." *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42. In reviewing child custody determinations, this court will affirm the district court's factual findings if they are supported by substantial evidence. *Id.* at 149, 161 P.3d at 242. "Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error, or to findings so conclusory they may mask legal error." *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015) (internal citations omitted). When making a custody determination, the sole consideration is the best interest of the child. NRS 125C.0035(1); *Davis*, 131 Nev. at 451, 352 P.3d at 1143.

Modifying a joint physical custody arrangement is appropriate if it is in the best interest of the child. NRS 125C.0045(2); *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009). But modification of a primary physical custody arrangement is appropriate only when the district court finds that there has been a substantial change in circumstances affecting

the welfare of the child and that modification would be in the best interest of the child. *Ellis*, 123 Nev. at 150, 161 P.3d at 242. And when determining custody, the district court must make specific findings as to the best interest of the child, pursuant to NRS 125C.0035(4).

Here, the district court summarily concluded that because the parties' timeshare constituted a primary physical custody arrangement, and Rolando did not show a substantial change in circumstances, a modification to the timeshare was not warranted. But contrary to the district court's conclusion, pursuant to the most recent custodial order, the parties' timeshare was a joint physical custody arrangement. *See Bluestein v. Bluestein*, 131 Nev. 106, 113, 345 P.3d 1044, 1049 (2015) (holding that the 40 percent/60 percent guideline established by *Rivero* for determining whether parents are exercising joint or primary physical custody "should not be so rigidly applied that it would preclude joint physical custody when the court has determined in the exercise of its broad discretion that such a custodial designation is in the child's best interest").

We recognize that the parties disputed whether they were actually exercising the timeshare contained in the custodial order, but such a factual dispute must be determined by the district court based on any evidence presented. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014) (noting that arguments of counsel are not evidence and do not establish the facts of the case); *Rivero*, 125 Nev. at 430, 216 P.3d at 227 (explaining that when deciding whether to modify a physical custody arrangement, the district court must first determine what type of physical custody arrangement exists). And the district court here failed to make any findings as to whether

the parties were exercising a different custodial arrangement than that previously ordered. *See Davis*, 131 Nev. at 451-52, 352 P.3d at 1143 (explaining that without findings and an adequate explanation for the custody determination, an appellate court cannot say whether the custody determination was made for appropriate legal reasons). Thus, because the parties had a joint physical custody arrangement pursuant to the order in effect at the time Rolando filed his motion, the district court abused its discretion in concluding that Rolando was required to demonstrate a substantial change in circumstances. *See Rivero*, 125 Nev. at 430, 216 P.3d at 227 (explaining that a substantial change in circumstances is required when modifying a primary physical custody arrangement, but not a joint physical custody arrangement).

The district court also summarily concluded that Rolando failed to demonstrate modification was in the child's best interest. But it is unclear from the record upon what evidence this conclusion was based as the district court did not set the matter for an evidentiary hearing. *See Nev. Ass'n Servs., Inc.*, 130 Nev. at 957, 338 P.3d at 1255. To the extent the district court's conclusion was based on its summary assertion that *Rooney* applied, the district court may deny a motion to modify child custody without an evidentiary hearing if the moving party has not demonstrated adequate cause. 109 Nev. 540, 542, 853 P.2d 123, 124 (1993). "Adequate cause arises where the moving party presents a prima facie case for modification." *Id.* at 543, 853 P.2d at 125 (internal quotation marks omitted). And to make a prima facie case, the moving party must show that "(1) the facts alleged in the affidavits are relevant to the grounds for

modification; and (2) the evidence is not merely cumulative or impeaching.”  
*Id.*


As noted above, the district court denied Rolando’s motion without an evidentiary hearing and summarily stated that *Rooney* applied. But based on our review of the record, it is not clear that the district court properly considered or applied *Rooney*. The record demonstrates that Rolando moved to modify the custodial order based on his ability to spend more time with the child due to his retirement, the child’s request to spend more time with Rolando, and the child’s changing needs as he began entering his teenage years. Moreover, based on the parties’ arguments, it appears there was a question regarding whether the parties’ current timeshare was affecting the child’s well-being in light of his school schedule and the amount of time the child spent travelling between the parties’ homes on school days, and whether the child attending school from home due to the COVID-19 pandemic alleviated those concerns. Although the parties disagreed as to whether they modified their custodial timeshare and the basis for any deviations from the ordered schedule, Rolando’s allegations are relevant to whether a modification of the timeshare is in the child’s best interest and, if found to be true at an evidentiary hearing, could provide a basis to modify the parties’ timeshare. See NRS 125C.0035(4); *Rooney*, 109 Nev. at 543, 853 P.2d at 125. And nothing in the record indicates that this evidence would be merely cumulative or impeaching. See *Rooney*, 109 Nev. at 543, 853 P.2d at 125.

Thus, under these circumstances, we conclude that the district court abused its discretion in denying Rolando’s motion to modify custody.

*See Ellis*, 123 Nev. at 149, 161 P.3d at 241; *Davis*, 131 Nev. at 450, 352 P.3d at 1142-43. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.<sup>1</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Charles J. Hoskin, District Judge, Family Court Division  
Rolando Alburquerque  
Rosenblum Law Offices  
Eighth District Court Clerk

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<sup>1</sup>Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.